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NO. 90-1293

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT PLENARY REVIEW OF THE 6802 PAGE RECORD IN THIS CASE SOLELY BECAUSE PETITIONER DISAGREES WITH THE EN BANC MAJORITY OPINION FINDING THAT THE INTRODUCTION OF THE ILLEGALLY PROCURED CONFESSION WAS NOT HARMLESS UNDER CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967)?

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Respondent, Paul Kordenbrock, through counsel, respectfully requests that this Court deny the Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has stated Amendments V and XIV of the United States Constitution are involved.

Since Petitioner is seeking review of a capital trial and death sentence, Amendment VIII is also involved.

STATEMENT OF THE CASE

The basic facts are not in dispute. At approximately 9:30 a.m., on January 5, 1980, Paul Kordenbrock (Respondent) and Michael Kruse walked into the Western Auto Store in Florence Kentucky, with the intent to take some guns. The two men had agreed to just rob the place -- "no way was anyone to get hurt."

Respondent took the two proprietors of the store to the back and had them lay on the floor. Kruse's attempt to get some guns was interrupted by the unexpected entrance of Jack Webster and his eight year old son. Kruse waited on them, informed them that he could not assist them and, with that, they left.

At that point, Kruse gained access to the guns by breaking the glass case. With that Respondent shot Mr. Thompson and Mr. Allen in the neck from a distance of seven to eight feet. Mr. Allen died immediately. Mr. Thompson survived.

The night before the incident Respondent had arrived at a party at his sister's house "in bad condition." He was "kind of woozie" and he had slurred speech. He also had red eyes. Gary Ramell, one of the revelers, reported that Respondent was "spaced out" and pretty messed up. The party lasted until 1:00 a.m.

Some seven hours later Respondent awoke and drank two beers and ingested two Quaaludes. He took one more Quaalude thirty minutes later.

Jeff Piper testified that he saw Respondent some 30 minutes before the incident. At that time Respondent was "very high on Quaaludes." Respondent's speech was somewhat slurred and his eyes were messed up.

Piper had seen Respondent this way quite a few times for Respondent had purchased "street ludes" from him "almost every day" for the three prior months.

Respondent purchased ten Quaaludes from Piper and drove off toward the Western Auto Store.

Gary Ramell, who had seen Respondent at the party the night before, saw him 30 minutes to an hour after the incident. He testified that Respondent seemed "kind of mellow, he didn't seem like he had a problem in the world" and that he was a "little glassy eye[d]."

Richard Fehler testified that he also saw Respondent shortly after the incident. Respondent seemed to be a little jittery. He was definitely high -- he was "messed up when [he] came here." It seemed to Fehler that Respondent was on Quaaludes. Fehler indicated that this messed up state continued all day culminating in Respondent driving down the Interstate over 100 miles per hour.

Respondent was arrested for the murder at 10:10 p.m., the next day. He was taken to the police station where an intensive interrogation began at 11:34 p.m.

Respondent was swept from his familiar surroundings, placed into tight police custody and was faced with antagonistic forces.

The lead interrogator, Detective Charles Seay, had known the victim for twenty-three years, had sat and talked to him for hours on end, had gone to the same church, knew Mr. Allen's wife, and saw his kids grow up. It is interesting to note that Respondent acknowledged that the person during the interrogation who instilled the most fear in him was Detective Seay.

Over halfway through the interrogation, the interrogators were becoming frustrated with Respondent's reluctance to tell them anything meaningful about the crime. Respondent was reminded at that time by Detective Seay that he did not have to talk and followed up with "I would rather you tell me that you don't want to talk than just sit here." Respondent immediately responded **"Can't talk, right now I can't talk."**

As a seasoned veteran of the Kentucky State Police, Detective Seay knew what that unequivocal statement meant. Yet he pressed on for, as he admitted, he wanted to get the matter wrapped up that night. The interrogation continued.

At that point the interrogators turned up the heat regarding Respondent's girlfriend. They indicated to Respondent that his girlfriend would be arrested unless he gave a full confession. They told Respondent that his girlfriend's "ass is going to jail" unless he confessed. They falsely informed him

that his girlfriend could be kept in jail in Cincinnati for three days without any charges being brought against her. And they reminded Respondent that if he did not confess that his girlfriend would be put through an ordeal that she would not soon forget.

Yet, as all admitted, Respondent was still a most reluctant interrogatee and he refused to give a fuller confession.

Later, Detective Seay informed Respondent that they had arrested Kruse, his co-defendant, with one of the stolen guns and at that point he asked "now what he wanted to tell us." Paul responded **"I told you all that I can stand tonight."** To which the interrogators responded "do you want the girls hassled by the Cincinnati P.D.?" And the interrogation continued.

Eventually the interrogators wanted to start writing Respondent's confession. Yet he was steadfast **"Sir, I can't tell you no more tonight."** To which the interrogators responded, "Yes you can Paul, hey, if you can take it, we can take it."

And the interrogation continued with constant threats to Respondent's girlfriend. Eventually Respondent's resistance was broken down -- "As long as you don't hassle them girls, I'll tell you."

Prior to trial, Respondent moved the trial court to suppress his confession. Despite the fact that he was forced to bargain away his right not to incriminate himself, and in spite of the fact that he unequivocally attempted to cut off

questioning on numerous occasions, the trial court permitted the Commonwealth to introduce Respondent's confession at trial.

In that confession, Respondent made no reference to the use of drugs and contended that he shot the proprietors so they would not get up. He demonstrated no remorse. It basically spelled out a cold, calculated, intentional murder.

Because the trial court ruled that the confession was admissible, Respondent had no choice but to undertake the unenviable task of turning this damning evidence into his favor. In undertaking this task, Respondent let it be known that he was being forced into this position by the erroneous ruling of the trial judge and that his trying to make the best of a bad situation was not a waiver of his objections to that erroneous ruling.

Accordingly, Respondent gave an opening statement admitting the killing but denying it was intentional. This opening was qualitatively different from the cold, callous confession.

Respondent's theory of the case, after the confession was ruled admissible, was to admit the killing but to establish that it was not intentional because of his highly intoxicated state.

The testimony at trial established that Respondent had been on vast quantities of drugs for an extended period. On the morning of the incident he was under the influence of Quaaludes, marijuana and beer.

Dr. Don Nelson, a professor of pharmacology at the University of Cincinnati College of Medicine, testified that as a result of the drugs which Respondent had used on the day of the crimes, he was less likely to do complex planning and to formulate complex thoughts. Respondent was also less likely to appreciate that his conduct was criminal.

Dr. Nelson also testified that considering the amount of drugs which Respondent was on and had been ingesting for quite a while, his mental functions were significantly impaired. That is, his ability to make judgments about his conduct or to meaningfully deliberate higher or ethical moral legal decisions was greatly diminished.

In sum, the drugs which Respondent had been taking were interfering with his ability to reason and diminished his ability to use his brain. According to Dr. Nelson, someone like Respondent would be deemed physically and psychologically addicted to taking drugs. The taking of drugs after such an extended use would no longer be a voluntary act. It had become a disease.

The Commonwealth readily accepted this theory of defense when, in arguing that an instruction should be submitted to the jury on the theory of wanton murder for Respondent's co-defendant, it stated that the "wantonness would certainly be the fact that he went in there with this **guy that he knew to be on drugs.**" That prosecutor further stated "[Kruse] went in there with a guy [Respondent] with a gun that he knew was on drugs, or into jointly rob a store with **some nut like that.**"

Despite the fact that Respondent was not allowed to use supporting testimony from a psychiatrist, the jury still deliberated for seven and a half hours before finding that Respondent intentionally killed Mr. Allen.

The evidence at the penalty phase established that Respondent came from a family of ten children. At the age of thirteen he was taken to a social service agency by his mother because of family difficulties.

There is no doubt that Respondent desired a different relationship with his dad. As was testified to at trial, Respondent indicated that he would have liked to have been closer and to have done more things with his dad. There was no doubt this caused Respondent much emotional turmoil during the most difficult part of his life.

From 1973 until 1975 Respondent served in the Marines. While there, he and his brother-in-law were required to view a rather gruesome incident that stemmed from the inability of one of the Marines to adjust to the pressure of life. According to his brother-in-law, he and Respondent "watched one guy dive off a third story building and we stood there at attention and watched him bleed to death."

While Respondent was never in combat, he was in a battalion landing team which had to be ready for combat at any place in the world within six hours notice. He was honorably discharged from the Marines; unfortunately, **he came home with a severe drinking problem.**

In 1977 another gruesome trauma occurred in Respondent's life -- this time to him. He was so torn up while a passenger in a motorcycle accident (his face smacked into a road sign) that the hospital nurses who took care of him knew him as "the boy without a face." Respondent remained unconscious with a broken jaw for two and one-half days. He spent a month in the hospital recuperating with the assistance of a **heavy amount of drugs**. The accident was so serious that there was some question as to whether or not he would be able to make it. The injury was so extensive that his own sister was unable to recognize him at the time.

His **drug use increased dramatically after this accident**. He was unable to do all of what he had done before and he had a very difficult time coping with that reality; it changed his personality.

His **drug use continued and expanded unabated**. His sister, Angel Kordenbrock, believed that he got heavily involved in drugs in order "to be accepted...to be accepted by his friends, more or less, and to run away from himself." It was clear from everyone who knew him as he was growing up that Respondent could not have done that which he did in the Western Auto Store "if he wasn't on drugs."

Throughout his life Respondent was always a follower, never a leader.

Since Respondent was arrested for these crimes, he **changed "like night and day."** He was **truly sorry** for the pain and anguish he had caused by his actions. As an Episcopalian

Minister testified at trial, "I saw Paul as being **very remorseful** and **hurting very deeply over what he had done**, in sort of a childlike way. Paul had a very difficult time as I perceived it in expressing his hurt, and **I felt his ashamedness.**"

Respondent was also seen as being "pretty humble and kind of quiet" as a result of what he had done. Also as a result of this incident, he developed a "sense of humanity" about himself. Those who knew him well in his childhood testified that Respondent **"wasn't in his right mind when he did it**, most definitely. He couldn't have been in his right mind."

Terry Hall, Respondent's sister, asked the jury not to kill him because "he knows what he did was wrong and he is changing his ways and I would like to see him have a chance to come full circle and maybe make something good out of his life."

Unfortunately, he was sentenced to die. It was a close call for the jury; prior to returning its verdict, it wanted to "know if [it could] recommend a life sentence with no parole?"

After Respondent's direct appeal in state court proved unsuccessful, he filed a writ of habeas corpus in the United States District Court for the Eastern District of Kentucky. That Court and the initial panel of the United States Court of Appeals for the Sixth Circuit found that Respondent's confession was procured in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Yet, those two bodies concluded that the Commonwealth's use of this confession during this case-in-chief was harmless.

The Sixth Circuit, en banc, granted a Petition for Rehearing on the question of whether or not the introduction of

the improperly procured confession was harmless. The majority, like the dissenters, found that the confession was indeed taken in violation of Miranda. However, the majority of the en banc court, after reviewing the massive record in this case, deemed the introduction of the improperly procured confession not to be harmless under Chapman v. California, 386 U.S. 18 (1967) and its progeny. Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990).

As the majority observed in its opinion, in order for the Commonwealth to have proved Respondent guilty of capital murder the Commonwealth had to establish beyond a reasonable doubt that he committed the homicide with the intent to kill. The majority opinion correctly noted that "the most harmful piece of evidence the state had on the issue of his premeditated intent to kill was the unlawfully obtained confession." Id. at 1099. Its introduction also tended to undermine Respondent's claim, that he was under the influence of drugs and alcohol at the time of the shooting and that the shooting was a reflex action."

The majority of the Sixth Circuit correctly concluded that the improperly procured confession not only supplied the only concrete evidence of an essential element of capital murder but it also fatally undermined Respondent's defense of diminished capacity -- "[t]he inadmissible statements in the confession tend to establish premeditation and are hence inconsistent with the impulsive, reactive and reckless behavior associated with events caused by the influence of drugs and alcohol." Id. at 1098.

Petitioner now asks this Court to conduct its own plenary review of the massive record in this case simply because

it feels that the majority's harmless error ruling is wrong. Petitioner is not attacking and could not attack the finding by all who have reviewed this issue in the federal system that the confession was procured in violation of Miranda v. Arizona and Michigan v. Moseley, 423 U.S. 96 (1975).

PETITIONER'S MISSTATEMENTS OF FACT

At the outset, Petitioner uses the most damning part of the illegally procured confession as part of its Statement of the Case to demonstrate that Respondent's actions were intentional. At page 6 of the Petition for Writ of Certiorari Petitioner states that Respondent "fired from a distance of seven to eight feet at both men's heads 'so they wouldn't get up'."

The fact that Respondent has to use this improperly introduced quote to establish the element of intentionality conclusively demonstrates how its introduction could not possibly be harmless under Chapman v. California, supra.

Next, Petitioner did not fully explain the circumstances surrounding Respondent personally giving an opening statement in this case. At the outset, it must be noted that prior to trial the trial court appointed Respondent to be co-counsel in this action. Secondly, under Kentucky Rules of Criminal Procedure (RCr) 9.42(d), a defendant is given a personal right to make an opening statement. That rule reads in pertinent part that "[t]he defendant or his attorney may make his opening statement."

Another misstatement which needs to be corrected is Petitioner's contention that during closing argument

"Respondent's counsel reiterated the confession" (Pet. for Cert. 9). During the closing argument Respondent's counsel actually reminded the jury that Respondent had confessed upon being arrested (after all the confession was introduced over his objection) but he spent the rest of the closing argument, as he did during the entire trial, distancing Respondent from that cold confession. Respondent's defense was that while he may have shot the two men he did not do so with the intent to kill them. Neither Respondent or his counsel "reiterated" that portion of the improperly introduced confession which portrayed him as a cold blooded, intentional murderer.

Also Petitioner leaves this Court with the impression that the decision to reverse Respondent's conviction and sentence was by the narrowest of margins "a 7-6 vote" (Pet. for Cert. 11). However, as this Court can clearly glean from the front cover of the United States Court of Appeals for the Sixth Circuit Opinion in this case, eight members of the en banc panel voted to reverse as to the sentence of death. Judge Norris joined the majority on that point.

Finally, but perhaps most important, Petitioner has misstated Respondent's basic argument. Petitioner is inexplicably contending that Respondent's argument below was that his opening statement was "compelled" and involuntary.

Respondent has neither heretofor nor is he now arguing that the issue in his case is whether he was prejudiced by giving an opening statement. Respondent's argument is simply that the Commonwealth has failed to meet its burden of establishing beyond

a reasonable doubt that its use of Respondent's improperly procured confession as an integral part of its case-in-chief was harmless under Chapman v. California, supra.

REASONS FOR DENYING THE WRIT

A.

SUMMARY OF ARGUMENT

Petitioner is asking this Court to grant plenary review simply because of its contention that the Sixth Circuit erroneously resolved the factual question of whether or not the introduction of the illegally procured confession was harmless under Chapman v. California, supra. Since Petitioner is not arguing that the en banc decision by the Court of Appeals is wrong on the law, and since the Sixth Circuit has carefully and correctly applied the proper harmless error analysis to this massive record, this Court's limited exercise of its certiorari jurisdiction is unwarranted. (The State Transcript of Record contains 1347 pages; the State Transcript of Evidence contains 4824 pages; and the evidence generated in the Federal District Court contains 631 pages.)

B.

PETITIONER'S CONFUSION AS TO RESPONDENT'S ARGUMENT

As noted above, the bulk of Petitioner's pleading prays that this Court undertake its own review of the 6802 page record in this case to determine whether or not the Sixth Circuit's en banc factual resolution of the harmless question was clearly erroneous. The majority of the remainder of Petitioner's

argument is based upon its apparent confusion as to what Respondent has argued throughout the entire review process.

Petitioner states on more than one occasion that "[t]he question in the present case is whether Respondent's personal confession to the jurors during his opening statement was made knowingly and voluntarily." (Pet. for Cert. 15). See also page 13 where Petitioner contends that "Respondent argued he was 'compelled' to confess at trial."

The issue in this case is not whether Respondent was "compelled" to confess at trial; rather, the issue is whether or not the introduction of the improperly procured confession was harmless when viewed in the entire context of Respondent's lengthy trial.

Respondent has never argued that the opening statement prejudiced him. He has merely asserted that because of the tangible and qualitative difference between the opening statements (wherein he pleaded his actions were not intentional and he beseeched the jury for mercy) and the confession (which demonstrated Respondent to be an intentional, cold, calculating and avaricious murderer who is worthy of no sympathy), that Respondent personally giving an opening statement could not be deemed a waiver of his objection to the introduction of the confession.

In resolving whether or not to grant review, this Court should not be mislead by Petitioner's 11th hour case of confusion.

C.

THE SIXTH CIRCUIT DID NOT MISAPPLY CONTROLLING CASELAW

Petitioner contends that the Sixth Circuit's en banc majority opinion "specifically rejects this Court's decision in Oregon v. Elstad, 470 U.S. 298 (1985)." (Pet. for Cert. 13).

The Sixth Circuit did **not** reject this Court's holding in Oregon v. Elstad; rather, the Sixth Circuit correctly rejected Petitioner's argument that Oregon v. Elstad was applicable.

As this Court will remember, in Elstad the question was whether or not a **second** confession procured from an in-custody defendant was tainted by an improperly procured earlier confession. That earlier confession, unlike Respondent's, **had been suppressed** by the trial court. Elstad unsuccessfully argued that his subsequent confession had been tainted by the earlier confession.

Petitioner's Elstad argumentation is inextricably bound in its heretofore mentioned confusion as to what Respondent is actually arguing. If indeed Respondent was arguing that the error committed in this case was the improper compelling of his opening statement, then Oregon v. Elstad might have some applicability. However, that argument has not been raised and is not before this Court.

Again, the issue is whether or not the introduction and use by the state in its case-in-chief of Respondent's improperly procured confession was harmless under this Court's well-established Chapman standard. Elstad is not a harmless error case. It simply is a case which gives lower courts guidance on

how to resolve questions of whether or not an improperly procured confession later taints any further confessions taken from an in-custody defendant.

D.

THE SIXTH CIRCUIT'S OPINION HAS NOT CREATED A CONFLICT WITH THE 11TH CIRCUIT

Oregon v. Elstad, supra, was applicable to the 11th Circuit's determination as to whether or not subsequently procured confessions were tainted by an initial improperly obtained confession in Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985) (modified on other grounds in 781 F.2d 185 (11th Cir. 1986), Cert denied, 479 U.S. 909 (1986). However, neither Elstad nor the rationale of the 11th Circuit in applying Elstad is applicable herein given the reality that the initially procured confession was introduced and used against Respondent and no argument is being made that a subsequent confession was inadmissible as the result of the taint of that first confession.

In Martin v. Wainwright, supra, the 11th Circuit did have before it the question of whether or not the introduction of the improperly procured initial confession was harmless under Chapman. The 11th Circuit, after reviewing the entire record in the case, concluded that the error was harmless because Martin had given a "far more detailed description of the murder" in a subsequent confession which had been ruled admissible under an Elstad analysis.

Unlike the confession of Respondent, the improperly admitted confession in Martin had merely indicated that he had

killed the victim. Furthermore, the 11th Circuit noted that in addition to the admissible confession:

> The jury had before it the testimony of Martin's accomplice, Gary Forbes, who gave a lengthy account of the robbery, kidnapping, and sexual battery of Patricia Greenfield, and who told the jury how Martin, armed with a knife, lead the blindfolded young woman down a dirt road at Lantana Dump and returned fifteen or twenty minutes later, saying that he had killed Greenfield by stabbing her in the throat. Finally, the jury was presented with the unrebutted testimony of a state pathologist, who examined Greenfield's body and found the cause of her death to be the multiple stab wounds in the throat. Id. at 933.

Since the Sixth Circuit's harmless error analysis in this case was the same as the 11th Circuit's in Martin, there is not a conflict between the two decisions. The 11th Circuit had a markedly different fact situation before it in conducting its Chapman analysis.

An 11th Circuit case closer on point is Owen v. State of Alabama, 849 F.2d 536 (11th Cir. 1988). In that case the 11th Circuit had before it a case where an on-duty uniformed police officer was murdered by two blasts from a shotgun at the scene of a traffic stop. (Id. at 537). A confession was procured from Owen in violation of Miranda.

At trial Owen raised a diminished capacity defense (insanity) wherein he presented psychiatric testimony (which Respondent was estopped from doing in this case). The psychiatrist was required to relate to the jury the details of

the shooting as explained to him by Owen. Furthermore, Owen's ex-wife also testified that Owen had telephoned her on the night of the shooting and had given her details as to the circumstances of the killing.

As in this case, the state had argued that the intent to kill "was evident from the facts of the crime and the cold blooded method in which the killing was carried out." In rejecting this argumentation, the 11th Circuit stated:

> Assuming arguendo that the intent to kill can be inferred from the nature of a crime, we cannot say that the admission of Owen's police confession did not contribute to his conviction. Since the police confession was the only direct evidence of intent, it is likely that the admission of that statement prejudiced Owen. Id. at 541 fn. 2.

The Court concluded that since the improperly introduced confession suggested "that he had an intent to kill and that he understood what he had done," its admission was not harmless error because it contradicted his diminished capacity defense.

Contrary to Petitioner's contention, Owen is more directly on point than Martin. But the bottom line is that in both instances the 11th Circuit undertook the appropriate Chapman analysis in concluding that Owen was entitled to relief but Martin was not. Likewise, the Sixth Circuit has undertaken the proper Chapman analysis in this case and after its review of the entire, lengthy record, its conclusion regarding harmlessness is unassailable.

Before passing, it is important to note that the 11th Circuit has recognized that in harmless error jurisprudence "the admission of an unlawfully obtained confession rarely is 'harmless error'...[b]ecause confessions carry 'extreme probative weight.'" Christopher v. Florida, 824 F.2d 836, 846 (11th Cir. 1987).

One final note: The dissenters in the Sixth Circuit did **not** rely on Oregon v. Elstad as providing a basis for undermining the majority's opinion. For that matter, Oregon v. Elstad was **not even mentioned** by the dissent.

E.

THE SIXTH CIRCUIT DID NOT IGNORE ONE OF ITS OWN PRIOR DECISIONS

Petitioner contends that the en banc majority has ignored its own precedent -- Burks v. Perini, No. 85-3507 (6th Cir. November 25, 1986) (unpublished opinion).

At the outset, Burks v. Perini was fully discussed and argued before the en banc panel in the Sixth Circuit. Secondly, the majority opinion specifically addressed the District Court's reliance on Burks v. Perini, and correctly found that reliance to be "misplaced." Kordenbrock v. Scroggy, supra at 1099. Thus, it strains credulity to argue that the Sixth Circuit has ignored its own precedent.

Before passing, it is important to note that Burks was an unpublished opinion of the Sixth Circuit which, by very definition, means that it was not worthy of full text publication. See generally Rule 24(a) of the Sixth Circuit Court

of Appeals -- Criteria for Publication. See also Subsection c of that Rule where the Sixth Circuit has indicated that the use of unpublished opinions "is disfavored."

Before passing, again it is important to note that the dissent in the Sixth Circuit panel did not make a meaningful attempt to show that Burks v. Perini controlled the outcome of this case. The reason for that is evident when one realizes the factual distinctions between both cases.

In Burks, the defendant admitted an **intentional** killing, but contended he acted in self-defense. In effect, that case presented the jury with a true black and white factual issue. The defendant in Burks stated that I committed the crime, I did it intentionally, but I am entitled to an acquittal because of self-protection. Unlike Respondent, **Burks did not rely on a diminished capacity defense** since there was no evidence of alcohol or drug intoxication.

The facts as introduced against Burks totally belied his theory of self-protection. At trial, an eyewitness "testified that Burks, without provocation, shot Fletcher in the stomach and then shot him in the back as he was running toward the bar." Furthermore, two admissions of guilt were given by Burks prior to the Miranda violation in that case. In that context, it was understandable why the Sixth Circuit panel concluded, in this unpublished opinion, that the improper introduction of Burks confession was harmless under Chapman.

F.

TWO JUDGES DID NOT REFUSE TO APPLY HARMLESS ERROR ANALYSIS

Petitioner pounces upon some loose language in Judge Nelson's concurring opinion to argue that he and Judge Ryan refused "to consider the harmless error rule in a capital case." (Pet. for Cert 29).

At the outset, Judge Ryan stated unequivocally that the reason he could not vote to affirm was because he was "unable to say, beyond a reasonable doubt, that the unlawfully admitted confession did not contribute to the verdict and subsequent death sentence in this case." Kordenbrock v. Scroggy, supra, at 1135. Judge Ryan reasoned as follows:

> The illegally admitted confession is not only an explicit and damning admission of the killing, it is, by its language, tone and content, as well as the absence of any claim of diminished capacity or uncertainty of purpose, powerful circumstantial proof of the clear headed intention to execute both victims. It is a complete and unqualified confession of premeditated murder, strikingly inconsistent with the defendant's courtroom claim of diminished capacity. As such, it is the most powerful, although not the sole, evidence in the record of defendant's malice and premeditation. Id.

Finally, in total refutation of Petitioner's claim that he refused to apply the harmless error standard in a capital case, Judge Ryan stated "I cannot say, beyond a reasonable doubt,

that such evidence did not 'contribute to the verdict'. Chapman v. California, 386 U.S. 18, 23 (1967)." (Id. at 1135-1136).

A careful and correct reading of Judge Nelson's opinion demonstrates that he was not rejecting the harmless error analysis in a death penalty case; rather, he was reflecting the now well established reality in death penalty jurisprudence that "[d]eath cases can be different for jurors as well as for judges." Id. at 1133. Judge Nelson, in undertaking his harmless error analysis, clearly took into consideration the oft quoted maxim that the "qualitative difference of death...requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999 (1983). It also must be noted that Judge Nelson specifically "concur[red] in the conclusions" by the majority that the improper use of the confession was not harmless under Chapman v. California, supra. (Id.).

G.

THIS COURT HAS ESTABLISHED CLEAR AND BRIGHTLINE BOUNDARIES FOR DEFINING MIRANDA AND FIFTH AMENDMENT VIOLATIONS

Petitioner asserts, without explaining why, that review by this Court is "essential to clarifying the boundaries of the Fifth Amendment when a technical Miranda violation occurs." (Pet. for Cert 12). The fact that such assertion is unsupported is understandable: This Court has consistently given clear and brightline boundaries as to what interrogators can do when an in-custody citizen expresses a desire to cease interrogation. See Miranda v. Arizona, supra and Michigan v. Moseley, supra.

As this Court recognized in Miranda, just giving a defendant the "warnings" will not suffice for after that, "[i]f the individual indicates **in any manner**, at any time prior to or **during questioning, that he wishes to remain silent, the interrogation must cease.** Id. at 473-474. This Court recognized that "[w]ithout the right to cut off questioning, the setting of an in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked." Id. at 474.

This Court had occasion subsequent to Miranda to clearly define what the "right to cut off questioning" meant. As it recognized in Michigan v. Moseley, supra, when a defendant exercises "his option to terminate questioning **he can control the time at which questioning occurs**, the subjects discussed, **and the duration of the interrogation.**" Law enforcement officers are mandated to "scrupulously honor" a defendant's invocation of his right to control the time and duration of the interrogation.

Nothing subsequent to the decisions in Miranda and Michigan v. Moseley have clouded the clear guidelines found in those two cases. For that matter, this Court recently reaffirmed its dedication to the bright line principles espoused in Miranda in a closely analogous situation where a defendant has exercised his right to counsel during an interrogation. See Minnick v. Mississippi, _____ U.S. _____, 111 S.Ct. Rptr. 486 (1990).

H.

THE SIXTH CIRCUIT'S DECISION WAS CORRECT

When all of the wheat is removed from the chaff, it is clear that Petitioner is protesting that the Sixth Circuit decided this case incorrectly. However, Petitioner has not demonstrated how and why the majority's opinion was incorrect. It just contends that the dissenting opinion was more correct.

It is understandable why Petitioner fails to take a frontal assault on a majority opinion. Chief Judge Merritt's harmless error analysis is unassailable.

In undertaking this harmless error analysis, the Chief Judge was correct to state that such an "inquiry is fact specific and requires an analysis of the particular facts at hand" Id.

In undertaking this inquiry, the Chief Judge initially and correctly noted that "the portion of [Respondent's] confession taken after the Miranda violation -- other than the inferences to be made from the fact the robbery and shooting -- **was the only concrete, non-circumstantial piece of evidence the state had to prove the premeditation element of the crime.**" In demonstrating the impact that the improper introduction of this confession had on the jury the Chief Judge made the following comments:

> Both as an element of the offense and as a reason for imposing the death penalty, the state attempted to prove that [Respondent] consciously formed an intent to kill independently and uninfluenced by any effects drugs and alcohol may have had on his mental and emotional state. Logically a juror could easily reason that the inadmissible

> statement that [Respondent] fired "at their heads so that they wouldn't get up" implies a mental process of deliberation and forethought sufficient to exclude drugs and alcohol as an immediate or direct cause of the homicide. Id. at 1097-1098.

The Chief Judge correctly pointed out that the defense of diminished capacity presented by Respondent turned on what the juror felt was his reasons for killing: Was it his conscious intent to do so or was it the direct but unintentional result of the influence of drugs of alcohol? Since the inadmissible statements in the confession tended to establish premeditation and were "inconsistent with the impulsive, reactive and reckless behavior associated with events caused by the influence of drugs and alcohol", its introduction could not have been harmless as to both guilt and innocence and as to sentencing. Id. at 1098-1100.

As to the question of whether the improper introduction was harmless at sentencing, the Chief Judge pointed out that it was clear from the record that the jury was struggling with its decision as to what punishment to impose. "Indeed, after some deliberation the jury asked if they could sentence [Respondent] to life without parole indicating an interest in imposing the harshest possible sentence short of death." Id. at 1098.

Again it must be noted that Petitioner has really not taken on Chief Judge Merritt's harmless error analysis in this case. Rather, it indicates that the dissenter's opinion, after reviewing the same extensive evidence, came to the more correct resolution. Instead of arguing how this was more correct,

Petitioner merely quotes the dissenter's harmless error analysis.

While it is true that the dissenting opinion came to a different conclusion, it cannot go without noting that that particular opinion failed to take into consideration the most important testimony which was introduced in Respondent's defense during the trial. Dr. Don Nelson, a Professor of Pharmacology at the University of Cincinnati College of Medicine, testified that as a result of the drugs which Respondent had used on the day of the crimes, he was less likely to do complex planning and to formulate complex thoughts. In effect, the drugs that Respondent was taking were interfering with his ability to reason and were diminishing his capacity to carry out purposeful and intentional acts.

By the dissenting opinion's failure to mention Dr. Nelson's testimony vis-a-vis Respondent's defense of diminished capacity in its harmless error analysis, it fails to give adequate weight to the strength of his defense and to the eviscerating effect that the improperly introduced confession had on that defense.

Before passing it is important to note that while the dissenting opinion ignored Dr. Nelson's testimony when undertaking its harmless error analysis regarding the confession, the dissent did use Dr. Nelson to show that Respondent was not harmed by failing to have the testimony of a psychiatrist (Dr. Nizny) at the trial.

Respondent argued below that he had been thwarted in his attempts to put on the testimony of Dr. Nizny in support of

Respondent's theory of defense. Dr. Nizny would have testified that Respondent was mentally ill and emotionally disturbed at the time of the incident. Dr. Nizny would also have been able to testify that Respondent did not have the intention to end anyone's life.

In rejecting Respondent's argument (the dissent was actually the majority on this issue below), the dissent concluded that Respondent's constitutional rights under Ake v. Oklahoma, 470 U.S. 68 (1985) "were adequately protected by the testimony of Dr. Eljorn Don Nelson", Kordenbrock v. Scroggy, supra at 1119. The dissent's conclusion was based on its finding that Dr. Nelson's testimony was "sufficient to establish the defense of diminished responsibility and mental capacity." Id. at 1120.

The absence of any discussion of the impact that the improper confession had on the testimony of this most important witness fatally undermines Petitioner's contention that the dissenting opinion was more correct in the harmless error analysis.

Petitioner had his day in court in the Sixth Circuit. The issue was fully briefed and competently argued by both sides. The Sixth Circuit reviewed the entire record in this case and concluded, contrary to Petitioner's position, but consistent with the applicable law governing confessions and harmless error, that the complained of error was prejudicial to Respondent.

Now Petitioner is beseeching this Court to undertake a similar review of the voluminous record in this case in hopes that this Court will reach a contrary finding. In the absence of

any real or perceived misapplication of constitutional law, this Court is, in essence, being asked to substitute its judgment for the en banc panel of the Sixth Circuit Court of Appeals.

Institutionally this Court is simply not set up to undertake such a task. If it granted cert in situations where a Petitioner simply contends that a reviewing court's factual resolution of the properly applied harmless error standard is incorrect, then this Court would be mandated to review every record which contained a constitutional error no matter the size of that record -- even if its 6802 pages as found in this case.

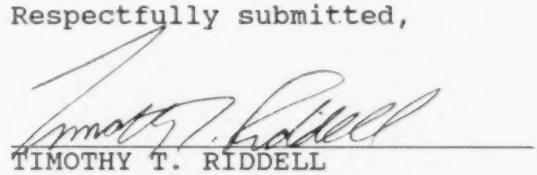
This Court's limited time is precious. There are too many important constitutional issues that need to be resolved. Undertaking harmless error analysis in cases such as this where there has been no challenge as to the appropriateness of the applicability of the constitutional rules would be a travesty of justice for those litigants who have legitimate claims for this Court to hear and resolve.

CONCLUSION

Petitioner has asserted no special and specific reasons why this Court should grant a writ in this case. The Sixth Circuit correctly applied the applicable controlling decisions. The Court's decision did not create a conflict with the 11th Circuit; rather, both circuits approach to the clear guidelines that this Court has laid down in regard to Miranda and Chapman are consistent. The en banc Sixth Circuit fully addressed and found to be inapplicable a non-published prior opinion by one of its panels. Judge Ryan clearly used the Chapman standard and

Judge Nelson's harmless error analysis is reflective of the qualitative difference of death cases. Miranda and Michigan v. Moseley set out in unequivocal fashion the procedures which interrogators must follow and what they can and cannot do once a defendant exercises his control over the timing and duration of in-custody interrogation. Finally, the Sixth Circuit's factual resolution of the properly applied harmless error standard is not clearly erroneous.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed via United States Postal Service, first class, postage prepaid on this 21st day of March, 1991, to the Honorable Michael Harned and the Honorable Carroll Ullerich, Assistant Attorneys General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.